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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VIDAL LOPEZ CORTEZ,

Defendant and Appellant.

G044581

(Super. Ct. No. 10CF0496)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.  
Michael Hayes, Judge. Affirmed as modified.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and  
Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Vidal Lopez Cortez of all six counts with which he was charged: (1) lewd act upon a child under age 14 (Pen. Code, § 288, subd. (a));<sup>1</sup> (2) forcible lewd act upon a child under age 14 (§ 288, subd. (b)(1)); (3) aggravated sexual assault of a child (§ 269, subd. (a)(3)); (4) attempted oral copulation with a person under age 14 (§ 288a, subd. (c)(1)); (5) sodomy of a person under age 14 (§ 286, subd. (c)(1)); and (6) sodomy by force (§ 286, subd. (c)(2)). After dismissing count 1 as a lesser included offense of count 2, the trial court sentenced defendant to 21 years to life in state prison. The sentence consisted of a 15 years to life term for count 3, a consecutive six year term for count 2, and a concurrent three year term for count 4. The court stayed execution of sentence on counts 5 and 6 pursuant to section 654.

Defendant raises three issues on appeal. First, as to count 2, he claims there was insufficient evidence of “force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim” (§ 288, subd. (b)(1)). Second, defendant posits the court improperly sentenced him to a consecutive six-year determinate sentence for conduct (touching the victim’s penis) that occurred at the same time as the conduct resulting in defendant’s indeterminate sentence of 15 years to life in prison (sodomizing the victim). Third, defendant asserts the court should have awarded him 718 custody credits rather than 717 custody credits.<sup>2</sup> We affirm.

## FACTS

The victim was 11 years old at the time of the offense, which occurred on the night of August 1, 2008. Victim lived with his mother and five siblings. Sometime in

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<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> The Attorney General’s brief does not address this third argument. We treat this silence as a concession of the correctness of defendant’s contention and therefore award him an extra day of custody credit.

2008, defendant rented a room in victim's home. Victim's mother considered defendant to be a trusted friend.

On the night in question, victim was in his mother's bed. He left the room sometime during the night. Defendant invited victim to come into defendant's room to watch cartoons. Victim fell asleep in defendant's bedroom, but later awoke to find defendant sexually abusing him. Defendant had inserted his penis into victim's anus. While defendant was thrusting, victim yelled at defendant to stop, to no avail. Defendant was simultaneously grabbing victim, fondling victim's penis, and kissing victim's mouth. Defendant touched victim's penis for "[l]ike a minute." Victim did not try to get away; he was in shock and defendant was holding onto him. Victim experienced pain. The sodomy "hurt" and it also "hurt" when defendant grabbed victim's penis. Defendant removed his penis from victim's anus, moved victim onto victim's back, and attempted to climb on top of victim. Victim pushed defendant away. Defendant instructed victim to suck defendant's penis, but victim refused. Defendant then gave victim \$5 and told victim he would receive more money if victim did not tell his mother what had occurred.

Victim returned to his mother's bed. Victim was lying in a fetal position, shaking and rocking back and forth. Victim told his mother what occurred. Victim suffered physical injuries to his anus consistent with the reported sexual assault.

## DISCUSSION

### *Sufficiency of Evidence Supporting Forcible Lewd Conduct Conviction*

Defendant first contends the evidence can only support a standard lewd conduct conviction pursuant to section 288, subdivision (a) (count 1, which was dismissed by the court as a lesser included offense of count 2) rather than a forcible lewd conduct conviction under section 288, subdivision (b)(1) (count 2). "Section 288(a) prohibits the commission of a lewd or lascivious act on a child under age 14 done with

the intent to arouse or satisfy the sexual desires of the perpetrator or the child. Section 288(b)(1) further prohibits the commission of such an act ‘by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . .’” (*People v. Soto* (2011) 51 Cal.4th 229, 237 (*Soto*).)

The question, then, is whether there is substantial evidence of force, violence, duress, menace, or fear of immediate bodily injury. “Force, in this context, means physical force that is “substantially different from or substantially greater than that necessary to accomplish the lewd act itself.”” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004; see *Soto, supra*, 51 Cal.4th at p. 242.) “When force causes physical harm, it is commonly called ‘violence.’” (*Soto, supra*, 51 Cal.4th at p. 255, fn. 7 (conc. & dis. opn. of Werdegar, J.)) Duress, in this context, means “a direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.” (*People v. Leal* (2004) 33 Cal.4th 999, 1004.)

The record supports the jury’s finding of guilt under section 288, subdivision (b)(1). The victim was an 11-year-old boy who trusted defendant, an adult male living in victim’s home, enough to fall asleep in defendant’s bed. (See *People v. Veale* (2008) 160 Cal.App.4th 40, 46-47 [finding of duress supported by age differential between victim and perpetrator, and the location of assault in step-father’s bedroom in home of victim].) Victim awoke to find defendant had inserted his penis into victim’s anus and was committing harmful violence thereby (as evidenced by physical injuries suffered by victim). Defendant fondled victim’s penis with enough force to cause victim’s penis to hurt; as the prosecutor argued to the jury, it can be inferred that this touching exceeded the force necessary to complete the act. Defendant was grabbing victim while he performed his acts. (See *People v. Alvarez, supra*, 178 Cal.App.4th at p. 1005 [force includes “grabbing, holding and restraining that occur in conjunction with the

lewd acts themselves”].) Victim was shocked by the awful situation in which he found himself; it can be inferred that victim was put in fear of bodily injury by defendant’s actions. (*People v. Iniguez* (1994) 7 Cal.4th 847, 858 [commenting that any person awaking to find a sexual assailant in the midst of an attack “could reasonably react with fear of immediate and unlawful bodily injury”].) Victim yelled at defendant to stop, but defendant did not heed this request. The factual record in its totality supports the jury’s findings.

### *Consecutive Determinate Term*

Next, defendant argues the court erred in sentencing him to a consecutive, six year term for his forceful lewd conduct conviction.<sup>3</sup> The court opted not to sentence defendant pursuant to section 667.6, subdivision (c) (“[i]n lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified [including lewd acts]”). Instead, the court sentenced defendant pursuant to the standard determinate sentencing regime of section 1170.1, under which the court ran the six year sentence for count 2 consecutively but ran the three year sentence for count 4 concurrently.

“[A] trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court’s discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Bradford* (1976) 17 Cal.3d 8, 20; see also § 669; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87-88 [court is not limited to

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<sup>3</sup> The court sentenced defendant under the applicable version of section 288, subdivision (b)(1). (Stats. 2004, ch. 823, § 7, p. 4799.) In this version, the range for imprisonment was “three, six, or eight years.” Thus, the court selected the full midterm sentence.

factors identified in rules of court; discretion includes ability to consider overall appropriateness of sentence].)

The court explained its decision to select the midterm sentence for count 2: “The crimes for which defendant is convicted involved a single victim on a single occasion but did not involve a single act. [¶] In deciding to impose the middle term, the court is complying with . . . section 1170 . . . and has considered the factors contained in California Rule of Court 4.420. . . . [¶] This crime involved a high degree of cruelty, viciousness, and callousness in that the defendant sexually assaulted the 11-year-old boy in his bed and continued the assault after the victim awoke and protested. The victim was also vulnerable in that he was asleep when the attack began and was 11 years of age. The attack shows planning in that it took place while the victim watched T.V. in the defendant’s bed. On the other hand, the defendant has an insignificant record of criminal conduct and was not on parole or probation at the time this offense occurred.”

The court also explained its decision to run the six-year term consecutively rather than concurrently: “The court has sentenced the defendant to a consecutive six-year term to the indeterminate term because each of these crimes constituted a separate act from the other. The defendant had time to reflect, even though the acts occurred during the same event, and they were acts of violence against this victim. And this is according to California Rule of Court 4.425 . . . .”

Defendant claims the court improperly imported the “separate occasions” standard of section 667.6, subdivision (d), which includes consideration of the question whether the defendant “had a reasonable opportunity to reflect” before engaging in additional sexual misconduct. Defendant also correctly notes there is no evidence that the sodomy and lewd touching occurred on “separate occasions.” Defendant concludes that the court therefore committed sentencing error.

Defendant’s argument is unconvincing. In determining whether to run count 2 consecutively or concurrently, the court carefully considered all of the

circumstances of the case in light of the multiple factors identified in California Rules of Court, rule 4.425. The court did not abuse its discretion in deciding to run count 2 consecutively. The court acknowledged that the case involved multiple acts occurring on the same occasion. The court's comment about defendant having "time to reflect" logically refers to defendant initiating his crimes while defendant slept and declining to cease his conduct when victim told him to stop.

#### DISPOSITION

The judgment is modified to reflect the fact that defendant earned 718 total custody credits rather than 717 total custody credits. As modified, the judgment is affirmed. The trial court is directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.